SECTION 169 OF THE INTERNAL REVENUE CODE: AN INCOME TAX SUBSIDY FOR THE CONTROL OF POLLUTION

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The Tax Reform Act of 1969[1] introduced a subsidy for taxpayers who take steps to avoid air or water pollution. Section 169 of the Internal Revenue Code[2] now provides for a special amortization deduction for certain investments in devices which abate the pollution of air or water. This article discusses whether Section 169 is an efficient and rational means of subsidizing the control of pollution.[3] A further

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1. Pub. L. 91-172 (Dec. 30, 1969), 83 Stat. 487. *See* Note, *Economic Incentives for Pollution Abatement: Applying Theory to Practice*, 12 ARIZ. L. REV. 511, 531-34 (1970). For a discussion of the legislative history of the section, see McDaniel & Kaplinsky, *The Use of the Federal Income Tax System to Combat Air and Water Pollution: A Case Study in Tax Expenditures*, 12 B.C. IND. & COMM. L. REV. 351, 352-55 (1971).

2. All citations of section numbers are to the *Internal Revenue Code of 1954*, as amended, unless otherwise indicated. INT. REV. CODE OF 1954 will hereinafter be cited as I.R.C.

Since this article was written, the investment credit has been reinstated. *See* I.R.C. § 50(a), added by the Revenue Act of 1971, Pub. L. No. 92-178, § 101, 85 Stat. 497. Since the investment credit and section 169 are mutually exclusive, see I.R.C. § 48(a)(8), the practical importance of section 169 is now diminished, since it will often be more advantageous to take the investment credit. We nevertheless publish this article as we wrote it, because of what it shows as to the correct and incorrect methods of constructing tax subsidies, and because no one knows how long this reinstatement of the investment credit will last. Congress has twice before suspended or terminated the investment credit, *see* I.R.C. §§ 48(h) & 49, and it may of course do so again, especially if excess investment by firms is found to be inflationary. Thus, section 169 may return to its place in the sun.

3. Section 169 is referred to as a subsidy because it is granted for the relief of hardship or as an incentive rather than as a method of determining true net income. For an amplification of this distinction, see Surrey, *Tax Incentives as a Device for Implementing Government Policy: A Comparison with Direct Government Expenditures*, 83 HARV. L. REV. 705, 706-07 (1970). The question whether there should be subsidies of any type, through the tax system or otherwise, for those who abstain from polluting is beyond the scope of this article. This is obviously an important question, but it seems to require either a simple value judgment, or an economic analysis beyond the competence of the authors to make. Some economists argue that polluting firms are imposing their costs on the users of air and water, to the benefit of

analysis is made to determine whether a more defensible subsidy could be fashioned to reach more equitable results.

Section 169 allows a taxpayer to amortize the cost of a "certified pollution control facility" over 5 years on a straight line basis, regardless of the actual useful life of the facility.[4] A taxpayer which makes a qualifying expenditure of $100,000 for a device to control pollution from its factory is thus allowed to deduct $20,000 a year for 5 years from its gross income, in lieu of the usual depreciation deduction under section 167. Absent section 169, the taxpayer would be relegated under section 167 to deducting the cost of the facility over its useful life, which might be more than 5 years. If, for example, the useful life of the asset were 10 years, the taxpayer using straight-line depreciation would be allowed depreciation deductions on the device of only $10,000 per year for 10 years. Assuming there were no salvage value, the total depreciation taken over the years would be the same in both cases but under section 169 the deductions would come earlier, and that is the subsidy.

The core of section 169 is its definition of certified pollution control facility. To qualify, property the cost of which is to be amortized must consist of "a new identifiable treatment facility which is used, in connection with a plant or other property in operation before January 1, 1969, to abate or control water or atmospheric pollution or contamination by removing, altering, disposing, or storing of pollutants, contaminants, wastes, or heat."[5] The property must be placed in service before 1975.[6] It must also be tangible property, but not a building except in the case of a building which is "exclusively a treatment facility,"

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those who purchase goods whose production created pollution, and those who produce such goods.

> The logic of economic efficiency indicates that in the long run consumers and producers of pollution-creating products should pay prices that reflect the real costs of abating their pollution. Thus . . . the prices of pollution-producing goods should rise enough to cover the cost of controlling that pollution. To the extent that tax incentives or other federal grants reduce the costs of pollution-producing goods, a nonoptimal set of goods will be produced for society.

Roberts, *River Basin Authorities: A National Solution to Water Pollution*, 83 HARV. L. REV. 1527, 1535-36 (1970) (footnotes omitted). For other arguments against subsidies for producers who abate pollution, see Ruff, *The Economic Common Sense of Pollution*, 19 PUB. INT. 69, 77-78 (1970). *See also* Reitze & Reitze, *Tax Incentives Don't Stop Pollution*, 57 A.B.A.J. 127, 128 (1971).

4. If the useful life of the pollution control device is more than 15 years only the portion of the taxpayer's basis for the device which bears the same ratio to the total basis as 15 years bears to the actual useful life may be deducted under Section 169. The remaining basis, however, is eligible for the usual depreciation deductions under section 167. I.R.C. §§ 169(a), 169(f)(2)(A), 169(g).

5. I.R.C. § 169(d)(1).

6. The purpose of the 1975 cut-off date is to give Congress the opportunity to evaluate the effectiveness of the program. S. REP. No. 91-552, 91st Cong., 1st Sess. 251 (1969).

of a type which would ordinarily qualify for depreciation under section 167, and have either been constructed after December 31, 1968, or, though constructed before that date, acquired after that date for original use by the taxpayer.[7] The pollution control facility in question must be certified by the "State certifying authority having jurisdiction with respect to such facility" as having been constructed or acquired "in conformity with the State program or requirements for abatement or control of water or atmospheric pollution or contamination."[8]

Further, the federal Environmental Protection Agency[9] (EPA) must certify that the taxpayer's pollution control device complies with "applicable regulations of Federal agencies" and is "in furtherance of the general policy of the United States for cooperation with the States in the prevention of and abatement of water pollution . . . and . . . of atmospheric pollution. . . ."[10] The EPA is forbidden to certify a device "to the extent that it appears that by reason of profits derived through the recovery of wastes or otherwise . . . [the device's] costs will be recovered over its actual useful life."[11]

THE ARITHMETIC OF THE SUBSIDY

The Amount of the Subsidy

The amount of the subsidy granted by section 169 is the difference between the present value of deducting the cost of the pollution control facility over 5 years under section 169, and the present value of the depreciation deductions which would be allowed for the device absent section 169. For example, the computation of the subsidy for a device which cost $1,000, and which would have had to have been depreciated over 15 years but for section 169, is as follows:[12]

Present value of deducting $1,000 over 5 years ($200 per year) under section 169	$414
Less: Present value of deducting $1,000 over 15 years, using sum of the years-digits methods	367
Subsidy	$ 47

7. I.R.C. § 169(d)(4).
8. *Id.* § 169(d)(1)(A).
9. See Reorganization Plan No. 3 of 1970, 42 U.S.C. § 4321 (1970) regarding the creation of the EPA and the transfer of the certifying power to the EPA from the Secretaries of Interior, and of Health, Education and Welfare.
10. I.R.C. § 169(d)(1)(B).
11. *Id.* § 169(e).
12. This assumes no salvage value, a 5 percent interest rate, that the value of a depreciation deduction accrues at the close of the year for which the deduction is taken, that the asset in question is bought on the first day of the year, and a 48 percent tax rate which is the present rate on taxable income of corporations in excess of $25,000. Amounts are rounded to the nearest dollar.

It can be seen from this computation that the amount of the subsidy depends on the useful life of the device since, absent section 169, the present value of depreciation deductions depends upon the number of years over which the deductions must be taken. If, for instance, a useful life of 8, instead of 15, years had been used in the example given above, the present value of the deductions which would be allowed if section 169 did not exist would be $407, and the subsidy would be only $7. This means that the amount of the subsidy granted for the installation of two pollution control devices which cost the same amount will vary if the devices have different useful lives.

This would be irrational enough, but to this should be added the fact that the useful life of an asset for depreciation purposes is determined not by how long that particular asset will in fact last, but by which industry uses the asset. For example, assets used in the manufacture of wood pulp for paper are treated as having a useful life of 13 years, while assets used for the manufacture of chemicals are treated as having a useful life of 9 years.[13] Storage tanks may be used to abate pollution in both industries, but identical tanks would have a different useful life in each industry. Now, if the amount of the subsidy granted under section 169 turns on the useful life which a pollution control asset would have for depreciation purposes, and if that useful life varies according to the industry in which it is used, it follows that *the amount of the section 169 subsidy varies from industry to industry.*

A policy of different rates of subsidy for different industries is not necessarily indefensible. One industry's pollution problem may be more intractable than another's, or a given industry may be depressed and have greater difficulty affording the cost of controlling its pollution. The variability of the subsidy under section 169, however, by no means turns on such rational considerations. It turns, instead, on the mere accident of the average useful life which the Treasury has determined is to be used for all of that industry's assets, which has nothing to do with any consideration which is germane to pollution control policies.

13. Rev. Proc. 71-25, 1971 INT. REV. BULL. No. 28, at 62, 67. Under Treas. Reg. § 1.167(a)-11 (1971), a range of useful lives is set forth for each industry, and each taxpayer can choose a useful life from the range provided for its industry. It is assumed hereinafter that taxpayers will always choose the shortest useful lives allowed.

It should not be thought irrational for the Treasury to use a single useful life for calculating depreciation on all assets in a single industry, as long as the single useful life is a correct average of the many different actual useful lives of specific assets used in that industry. The Treasury's method has an obvious convenience over an asset-by-asset method. When industry-wide guideline lives were first introduced in 1962, the Treasury gave as an example that soap producers had until then been forced to use 201 different item lives "ranging from four years for fat acid pumps to 30 years for lathes used in making barrels." Treas. Release No. IR-517, July 11, 1962, 2 CCH 1971 STAND. FED. TAX REP. ¶ 1761, at 24, 222.

Some industries, such as the airline industry for which the Treasury prescribes a 5-year useful life, receive no subsidy.[14] It would, in fact, be disadvantageous for industries with 5-year useful lives to elect amortization under section 169 since to do so would be to elect straight-line amortization instead of the accelerated depreciation available generally to taxpayers under section 167. Accordingly, there is no subsidy for control of emissions from aircraft jet engines, but there is a subsidy for control of emissions from the same jet engines used as auxiliaries in electrical generating plants since the electrical generating industry uses a useful life of 22½ years.[15]

The Subsidy As a Tax Preference

The annual difference between a taxpayer's amortization deduction for a pollution control device under section 169 and the depreciation deduction to which he would otherwise have been entitled is declared by section 57(a)(4) to be an item of "tax preference." An additional tax of 10 percent is imposed by section 56 on a taxpayer's items of tax preference, but from the items of tax preference are first deducted $30,000 and the taxpayer's regular income tax.[16] For example, a corporate taxpayer which invested $1 million at the beginning of 1971 in pollution control equipment with a useful life of 15 years would have a deduction under section 169 of $200,000 for 1971. Absent section 169, the taxpayer would be entitled to a depreciation deduction on these facilities of only $125,000.[17] The difference of $75,000 is the tax preference, from which must be subtracted $30,000 and the taxpayer's regular income tax to arrive at the taxable base for the section 56 tax. Assuming that the corporation has taxable income of $100,000 after the section 169 deduction, the regular income tax would be $41,500. Hence, $3,500 would be subject to the 10 percent section 56 tax of $350.

It should be noted that all nine tax preferences, not just the amortization of pollution control facilities, are aggregated before the $30,000 and taxpayer's regular income tax are deducted.[18] For this reason, the result in the example would have been different if the taxpayer had also had other items of tax preference. Furthermore, the effect of allowing the taxpayer to subtract his regular income tax from his tax

14. Rev. Proc. 71-25, 1971 INT. REV. BULL. No. 28, at 62, 72.
15. *Id.* at 73. *See* McDaniel & Kaplinsky, *supra* note 1, at 369-70.
16. I.R.C. § 56(a)(1) & (2).
17. This assumes the use of the sum-of-the-years-digits method and that the asset has no salvage value.
18. I.R.C. § 56(a).

preferences is that two taxpayers with the same tax preferences will pay a different section 56 tax if their regular income taxes are different.

Allowing the taxpayer to subtract the regular income tax from the total of tax preferences before the section 56 tax is imposed on that total may result in a regressive section 56 tax. The higher the taxable income, the higher the regular income tax, and the lower the section 56 tax. In the example given above, the taxpayer had a taxable income of $100,000, regular income tax of $41,500, and a section 56 tax of $350. If the taxpayer's taxable income had been zero, it would have incurred no regular income tax and its section 56 tax would have been $4,500.[19] If the taxpayer's taxable income had been high enough to incur a regular income tax of $45,000 there would have been no section 56 tax since the exemptions under section 56(a)(1) and (2) would be equal to the amount of the tax preference. Making the amortization of pollution control facilities a tax preference will, therefore, have the least adverse effect on firms with high incomes, and the most adverse effect on firms which are just breaking even. The latter are firms which are especially in need of the subsidy.

This effect can also create a trap for the unwary, or even the wary. The subsidy for the rapid amortization of a device which cost $100,000 and has an 8-year useful life is about $700 to a corporate taxpayer in the 48 percent bracket.[20] Such a taxpayer would, if it incurred no regular income tax and if other tax preferences used up its $30,000 deduction from tax preferences, pay section 56 taxes over the 5-year amortization period with a present value of $1,525,[21] which is more than twice the present value of the benefit under section 169 for which section 56 tax is imposed. In other words, it may be disadvantageous to elect section 169 treatment. Whether it will be disadvantageous depends on three factors—the presence of other tax preference items, the absence of regular income tax, and the present value to the taxpayer of accelerated amortization—the occurrence of which over the 5-year amortization period cannot always be predicted at the time of election. The taxpayer which finds that it is paying more section 56

19. The section 56 tax would be computed as follows:

Tax preference under section 57(a)(4)	$75,000
Less exemption under section 56(a)(1)	30,000
	45,000
Rate imposed by section 56(a)	×0.10
	$ 4,500

20. See text following note 12 *supra* for the method and assumptions applied in computing the amount of the subsidy.

21. A 5 percent interest rate is assumed. For other assumptions in the computation of the present value of section 169 deductions and section 167 depreciation deductions, see note 12 *supra*.

tax than it is getting in benefits under section 169 will presumably want to cancel its section 169 election at some time during the 5-year amortization period if it understands the operation of the statute. Section 169(c) permits such a cancellation, but the cancellation is not retroactive.

SCOPE OF SECTION 169

New Plants

Section 169 applies only where a pollution control device is acquired or constructed *after* December 31, 1968, and is used in connection with a plant or other property which was in operation *before* January 1, 1969.[22] In other words, rapid amortization is available for a pollution control device which is subsequently added to a plant already in operation in 1968, but not for a pollution control device which was included in a plant when it was built nor for a device included in a plant built after 1968. At the Treasury's suggestion,[23] this provision was added to section 169 by the Senate Finance Committee, which explained that:

> [This] committee has . . . modified the House provision to limit its application to those situations where there is the greatest need for incentive. Since the cost of modifying an existing plant for pollution control purposes generally is substantially in excess of the cost of incorporating pollution control facilities into a new plant, the committee has limited the scope of the amortization deduction to facilities which are added to existing plants.[24]

There are several grounds for doubting the wisdom of this provision. First, if it is more expensive to modify an old plant than it is to build pollution control equipment into a new one, this fact is apparent to pollution control authorities. They can take it into account in setting standards and implementation schedules or in granting construction permits for particular plants, and in deciding when and against whom to bring enforcement actions. Accordingly, a firm with an old plant may incur no higher costs in avoiding pollution than a firm with a new plant, because less may be expected of it.

Secondly, even where old plants are expected to meet the full rigor of laws against pollution, the rule that old plants will incur greater costs than new plants obeying such laws holds true, if at all, only when plants

22. I.R.C. §§ 169(d)(1), 169(d)(4).

23. U.S. TREASURY, *Technical Memorandum of Treasury Position on H.R. 13270*, 91ST CONG., 1ST SESS. 121 (Comm. Print 1969), in 56 STAND. FED. TAX REP. No. 45, at 121-22 (October 8, 1969).

24. S. REP. No. 91-552, 91st Cong., 1st Sess., 249 (1969) [hereinafter cited as S. REP. No. 91-552].

within the same industry are being compared. For example, paper mills are ferocious and intractable polluters, while waterworks are quite the opposite. It is extremely expensive to prevent even a new paper mill from polluting, much more expensive than to modify a pre-1969 waterworks in order to meet the requirements of laws forbidding pollution. Section 169, however, would permit rapid amorization only of the costs incurred in controlling pollution from the pre-1969 waterworks, but not those incurred in controlling pollution from the new paper mill. This distinction rests upon the irrelevant ground that it is more expensive to control pollution from an old paper mill than from a new one.

Further, even where an old plant will have higher costs for preventing pollution than a new one, the fair procedure would be to subsidize the new plant proportionately less than the old one rather than denying it a subsidy entirely. If it costs twice as much to prevent pollution in an old plant as it does in a new one, that is a reason to give half as much subsidy for the new plant as for the old one, but is not a proper basis for totally denying a subsidy for the new plant.

Finally, it is usually thought socially desirable for firms to abandon high-cost plants in favor of new ones with lower costs, and this is just as true where the cost is that of preventing pollution as it is of any other cost. It seems distinctly odd to provide a subsidy which pushes firms in the other direction. But that is a general flaw in section 169: it pushes firms toward controlling pollution through methods which may be less efficient in the use of available resources than processes which are cheaper but unsubsidized.

Perhaps the provision denying relief in the case of new plants can be defended on a ground other than that given by the Senate Finance Committee. It could be argued that the subsidy for additions to old plants is justifiable because it is necessary to alleviate the hardship thrust upon investors in such plants by the tightening of pollution control laws. Suppose that an investment in a paper mill would have yielded 7 percent on capital before standards were set pursuant to the Federal Water Pollution Control Act, but only 5 percent after compliance with these standards. An investor who has had his rate of return reduced below his justified expectations has a more valid claim of hardship than one who after the passage of the Act decides to build a paper mill knowing that his rate of return will be only 5 percent. The latter investor would have had the option of choosing another investment from which he could obtain a higher yield than 5 percent.

This provision of section 169 also means that there is no subsidy for the taxpayer which abates pollution by changing its process and the

machines that it uses for production, instead of adding a device to its plant which has a specific anti-pollution function. Such a change would probably "represent the replacement of a substantial portion of a manufacturing plant which had been in operation before such date,"[25] which is treated as the building of a new plant ineligible for section 169 treatment. Furthermore, the EPA takes the view that a change of process which merely prevents the production of pollutants does not qualify since it does not remove, alter, dispose of or store pollutants.[26] If simplicity is desired, this is probably just as well in the case where the investment in new production machinery yields greater production or production at a lower cost. The subsidization of an investment in machinery for the purpose of changing a manufacturing process would raise a difficult problem of how much of the taxpayer's investment was attributable to control of pollution, and how much to increasing, or reducing the cost of, production. There is no such justification for denying section 169 treatment to a taxpayer whose change in process produces no benefit to him except the abatement of pollution. In any case, the denial of section 169 treatment to investments in changes of processes creates an incentive to use a method of pollution control—the installation of pollution control machinery—which may be less efficient, but subsidized.[27]

Which Kinds of Expenditures Qualify

Even if the taxpayer owns a pre-1969 plant, not every expenditure for the control of pollution yields relief under section 169. Only capital investments in tangible property are eligible,[28] so that a firm which acquires a patent or know-how which will enable it to reduce pollution gets no benefit, although it has borne as great a burden and acted as worthily as if it had bought a machine that had the same effect. The cost of a building cannot be amortized under section 169 except a building "which is exclusively a treatment facility."[29] There is no subsidy for the acquisition of land which is to be used as a place to store pollutants.[30]

25. Treas. Reg. § 1.169-2(a)(5)(ii)(b) (1971): A "substantial portion" is defined as one-fifth.

26. For the statutory requirement of removal, alteration, disposition or storage of pollutants, *see* I.R.C. § 169(d)(1). For the EPA's view, see Pollution Control Facilities, Guidelines for Certification, §§ 2d, 3b, 36 Fed. Reg. 19,132, 19,133 (1971) [hereinafter cited as Guidelines for Certification].

27. *See* Wilson, *Tax Assistance and Environmental Pollution*, 37 TAX POLICY 3, 6 (1969); Roberts, *supra* note 3, at 1533-34; Reitze & Reitze, *supra* note 3, at 130.

28. I.R.C. § 169(d)(4).

29. *Id.*

30. Only property "which is of a character subject to the allowance for depreciation provided in section 167" is entitled to section 169 treatment. *Id.* This, of course, does not include land. Treas. Reg. § 1.167(a)-2 (1956).

These provisions probably do not reflect a judgment that the control of pollution through the use of patents, buildings or land is necessarily less beneficial to society or imposes less of a burden on a firm than the purchase of tangible personal property to do the same job. Any such judgment would be wrong.[31] These restrictions probably are in the statute for historical reasons traceable to the investment credit which previously imposed such restrictions. Section 169, enacted by the same statute that repealed the investment credit in 1969, was a substitute for the investment credit. The legislative history of section 169 confirms this analysis:

> At the present time companies which install antipollution equipment involving property of a type for which the investment credit is available receive, in effect, an incentive through the investment credit for dealing with the pollution problem. The repeal of the investment credit in this regard could have an undesirable effect on the efforts made by private industry to combat the pollution problem were another type of incentive not made available.
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> In view of the possible undesired effect on pollution control of repealing the investment credit the [House Ways and Means] committee believes it is appropriate to provide an incentive to private industry for anti-pollution efforts.[32]

Whatever the function of these provisions as restrictions on the availability of the investment credit, they seem to make no particular sense as part of section 169.

Not only does section 169 draw pointless distinctions between different kinds of capital expenditures for control of pollution, it also discriminates against the control of pollution through methods the costs of which are in the form of higher operating expenses rather than the purchase of machinery. There is no subsidy for the firm that stops polluting by changing fuels, or by rescheduling production to coincide with the time of a stream's most rapid flow. Once again, firms are encouraged to use a means of controlling pollution that uses machinery which can be rapidly amortized under section 169[33] rather than a more

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31. *See* Roberts, *supra* note 3, at 1532-33.

32. H. REP. No. 91-413, 91st Cong., 1st Sess., pt. 1, at 197 (1969) [hereinafter cited as H.R. REP. No. 91-413]. Similar language can be found in S. REP. No. 91-552, *supra* note 24, at 249. Note also that if a taxpayer elects to amortize a facility under section 169, the investment credit is unavailable with respect to that facility. I.R.C. § 169(h).

33. Roberts, *supra* note 3, at 1533, makes this point and gives other examples: Chemical percipitation [*sic*] requires large outlays for chemicals, but when flexibly utilized it may still be cheaper than mechanical treatment before taxes. In addition, it appears that much abatement can be obtained through more careful management of existing facilities. In both these cases tax

efficient means. This anomaly is probably also attributable to the investment credit's having provided no subsidy for operating costs. Less explicable is the fact that section 169 extends only to devices which prevent pollution by "removing, altering, disposing or storing"[34] of pollutants: this seems to mean that there is no subsidy for the dispersal of pollutants, and the legislative history confirms this interpretation.[35] Properly timed and located dispersal may be a valid means of meeting ambient air or water quality standards,[36] the familiar example being a smokestack built to an extra height so that the smoke particles and gasses it emits will be spread over so large an area as to be unnoticed.

There is one way in which section 169 is surprisingly broad. Often the only alternative to air or water pollution is to trap, store, cart away and dump pollutants on vacant land which might be a town dump, land owned by the taxpayer, or land on which dumping is allowed for a fee. Equipment used for this purpose, such as a dump truck, should qualify for section 169 treatment as "removing, . . . disposing, or storing of pollutants."[37] This raises the question whether the taxpayer who simply buys a truck to cart away his trash is abating water or atmospheric pollution by refraining from burning his trash or dumping it into a nearby lake or river. It is arguable that all solid waste disposal equipment of whatever kind qualifies for section 169 treatment. The words of the statute suggest this result, but it is doubtful that Congress intended it, or that the estimated revenue loss from section 169 mentioned by the Senate Finance Committee[38] included the cost to the gov-

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incentives tend to bias industrial decision-makers away from the least expensive method toward methods which make maximum use of the kinds of capital facilities that would be eligible for special treatment under the incentive program.

See also Wilson, *supra* note 27, at 6; Reitze & Reitze, *supra* note 3, at 130.

34. I.R.C. § 169(d)(1).

35. S. REP. No. 91-552, *supra* note 24, at 250. The EPA interprets this statutory and committee language as permitting section 169 to apply to facilities for the dispersal of water pollutants which have been properly treated. *Compare* § 3a(2) *with* §§ 2C, 3b2, 7 of Guidelines for Certification, *supra* note 26, at 19132, 19133-34. The committee report also contains the stipulation that section 169 does not extend to a device that "removes certain elements from fuel (for example, sulphur which would be released as pollutant when the fuel is burned)." S. REP. No. 91-552, *supra* note 24, at 250.

36. NATIONAL AIR POLLUTION CONTROL ADMINISTRATION, DEP'T OF HEALTH, EDUCATION, AND WELFARE, CONTROL TECHNIQUES FOR SULFUR OXIDE AIR POLLUTANTS at xxiii, 98-105 (1969); Smith, *Reduction of Ambient Air Concentrations of Pollutants by Dispersion From High Stacks*, in PROCEEDINGS: THE THIRD NATIONAL CONFERENCE ON AIR POLLUTION 151, 154, 159 (1966). It is of course open to either the states or the EPA to conclude that dispersal is not a valid means of pollution control in enforcing its standards. If the state and EPA approve of dispersal, however, there seems no reason to deny a tax subsidy for it.

37. I.R.C. § 169(d)(1). The EPA agrees with this interpretation. Guidelines for Certification §§ 2(b), 3a(2), *supra* note 26, at 19132, 19133.

38. Revenue loss for 1974 was estimated at $115 million. S. REP. No. 91-552, *supra* note 24, at 252.

ernment of rapid amortization of every garbage truck owned by a firm that carts away its own garbage.[39]

CONFORMITY WITH STATE LAW

Amortization deductions can be taken under section 169 only for pollution control facilities certified by the state certifying authority[40] as having been constructed or acquired "in conformity with the State program or requirements for abatement or control of water or atmospheric pollution or contamination."[41] This raises the question of what is meant by in conformity with the state program or requirements. There are two possible interpretations. The first is that the taxpayer must have acquired its device at the command of state law: that state law must have compelled it to acquire the asset whose purchase price it now seeks to amortize. The second interpretation is that the taxpayer need not have been compelled by state law; it need only have acted so as not to violate state pollution laws, if any exist. The latter is the view of the EPA, expressed in advice to its regional offices:

> Significantly, the statute does not say that installation of a facility must be required by a State. Accordingly, assuming that use of a facility will not contravene any applicable State requirements, it will be eligible for accelerated depreciation. One example would be a facility installed in order to comply with regulations of the Atomic Energy Commission on emissions of radioactive particulates. The same result would obtain in cases where the certifying State had not yet adopted an implementation plan under the Clean Air Act to meet national ambient air quality standards.[42]

It is submitted that the EPA's interpretation is wrong, although the statute would be a better one if the EPA were right that compliance with federal law entitles firms to the subsidy. As the EPA admits, its interpretation means that a firm acting out of its free will, rather than

39. Garbage trucks owned by a commercial carter, on the other hand, would not qualify for section 169 treatment, because they would generate a profit for their owner, I.R.C. § 169(e), and perhaps also because they would not be used "in connection with a plant or other property." *Id.* § 169(d)(1). This means that if a commercial carter can cart away a taxpayer's pollutant more efficiently and cheaply than the taxpayer can itself absent the section 169 subsidy to the taxpayer, section 169 pushes the taxpayer in the direction of the less efficient, but subsidized, solution to its problem.

40. For air pollution, the state certifying authority is the state agency designated by the governor of the state as the official state air pollution control agency for purposes of the Federal Clean Air Act. For water pollution, the state certifying authority is the state health authority, unless the state has charged another single agency with enforcing its water pollution laws. *Id.* § 169(d)(2); 42 U.S.C. § 1857h(b)(1) (1970); 33 U.S.C. § 1173(a) (1970); Treas. Reg. § 1.169-2(c)(2) (1971).

41. I.R.C. § 169(d)(1)(A).

42. Guidelines for Certification, *supra* note 26, at 19134.

in obedience to law, to abate pollution is entitled to section 169 treatment. This is inconsistent with Congress' purpose in enacting the statute, which seems to have been to relieve the burden on those firms which are forced by law to abate pollution, and to give such firms an incentive to obey the law:

> Congress has addressed itself to the air and water pollution problem in legislation which it has passed in recent years. This legislation has laid a foundation for dealing with the pollution problem. In order to deal effectively with the Nation's air and water pollution problem, however, a significant part of the task must be met by private industry. In effect, private industry is being asked to make an investment which in part is for the benefit of the general public. . . .
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> . . . .
>
> The amortization deduction provided by the bill . . . will ease the impact on private industry of the additional costs which it *must* incur for pollution control facilities and, thus, should encourage private industry to cooperate in the *required* efforts.[43] [Emphasis added.]

It might be argued that the reference in this legislative history to recently enacted legislation leads to the interpretation that the subsidy is available where the taxpayer's investment is compelled by either federal or state law, but not where no law compels it. That is, section 169 applies where the taxpayer is compelled to act by *a* law, even if not by state law. There are two objections to this reasoning.[44] The first is

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43. H. REP. No. 91-413, *supra* note 32, at 197. Similar language appears in S. REP. No. 91-552, *supra* note 24, at 249.

As to whether the burden should be eased, see authorities cited *supra* note 3. Regarding the efficiency of the subsidy as an incentive to obey the law, it has been argued that

> [e]ven with a significant tax incentive, pollution control will remain a large net loss item for the firm. It is difficult to see how a tax incentive could persuade any firm that otherwise favored a delaying strategy not to delay
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> . . . .
>
> . . . [T]ax incentives simply serve to make a very unprofitable course of action somewhat less unprofitable. This kind of change in the situation does not seem likely to produce much change in the actions of industrial decisionmakers.

Roberts, *supra* note 3, at 1531-32.

44. Section 169 does not mention judicial review of either the grant or denial of state certification, but the legality of such state action might easily be an issue in federal tax litigation over a taxpayer's right to a deduction under section 169. The question whether a federal court should decide this issue arises. It seems that it should where one of the parties contends that the state has misinterpreted the language of section 169—for example, the meaning of "in conformity with State program or requirements." Interpretation of this language would be at issue if the state granted certification although the taxpayer did not act at the command of state law, and the Treasury denied the section 169 deduction on the argument advanced in the text of this article. Interpretation would also be at issue if the state, agreeing with the argument, denied certification for lack of a command of state law, the taxpayer claimed the section 169 deduction anyway, and the Internal Revenue Service denied the deduction. There is no reason for a federal court to feel foreclosed from deciding a

that it is an impossible burden on the section 169 words "*State* program or requirements" to say that they mean federal program or requirements. The second is that the congressional reference to recently enacted federal legislation undoubtedly meant the Clean Air and Federal Water Pollution Control Acts.[45] The scheme of these statutes is to require the states to enact and enforce state laws to forbid pollution.[46] The Water Pollution Control Act calls for the states to adopt water quality criteria and to implement and enforce these criteria. The federal role is to ascertain that each state's standards and enforcement plans are adequate; only if they are not is the EPA to promulgate a federal standard to be applied within an offending state.[47] The same pattern was used in the Clean Air Act as it stood in 1969, when section 169 was enacted.[48] Paradoxically, when the House and Senate Committees referrred to easing the burden of complying with recent enactments of Congress, they meant the burden of obeying state law.

The effect of this interpretation—that to qualify for section 169 treatment the taxpayer must be installing pollution control equipment in obedience to the command of state law—is unfortunate since it means that expenditures made by a taxpayer acting at the command of federal law only will not qualify. When section 169 was enacted in 1969, this was a minor oversight, since almost all law commanding firms to abate pollution was state law. Even the regulation of radioactive waste, usually thought to be the most federalized area of pollution control, was ar-

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question of federal law merely because a state administrative body has decided that question the other way. To the contrary, the need for uniformity in the interpretation of federal law makes desirable federal court review of such questions. It would be indefensible if two taxpayers, installing the same devices in two different states which had the same pollution laws (as interpreted by their state authorities), were to be treated differently because the two states' authorities interpreted section 169 differently. It would be as if there were a different federal tax law for each state. *Cf.* Woods & Reed, *The Supreme Court and Interstate Environmental Quality: Some Notes on the Wyandotte Case*, 12 ARIZ. L. REV. 691, 702-15 (1970).

45. 42 U.S.C. §§ 1857 to 1857*l* (1970); 33 U.S.C. §§ 1151-1175 (1970).

The Federal Water Pollution Control Act also declares it to be congressional policy "to recognize, preserve, and protect the primary responsibilities and rights of the States in preventing and controlling water pollution." 33 U.S.C. § 1151(b) (1970). The Clean Air Act declares "that the prevention and control of air pollution at its source is the primary responsibility of States and local governments." 42 U.S.C. § 1857(a)(3) (1970).

46. 33 U.S.C. § 1160 (1970); 42 U.S.C. § 1857d (1970).

47. 33 U.S.C. § 1160(c)(2) (1970). The Federal Water Pollution Control Act also provides for direct federal enforcement proceedings against a polluter when the state fails to control the conduct of the polluter, and an elaborate system of hearings and conferences (involving the polluter and federal and state authorities) proves unavailing. This procedure is so cumbersome and impractical that it is plain that Congress did not contemplate that it would be frequently invoked. *Id.* § 1160(a) to (k).

48. 42 U.S.C. § 1857d(c) (1970). The Clean Air Act also provided for federal enforcement actions in circumstances similar to those stated in note 46 *supra*. *Id.* § 1857d(d) to (k).

guably within the concurrent power of the states.[49] Since 1969, however, Congress and the President have created federal duties not to pollute, which are imposed directly on firms. The most important of these for its effects on qualification under section 169 is the presidential order establishing a program under the Refuse Act of 1899,[50] by which permits from federal authorities are required for the discharge of pollutants into the navigable waters of the United States and their tributaries.[51] The regulations issued for this program require polluters to comply with state law, but also provide that standards for issuing permits "will be based on an evaluation of the impact which the discharge or deposit may have on . . . fish and wildlife values not reflected in or adequately protected by applicable [state] water quality standards, if any."[52] In other words, taxpayers can expect in some circumstances to have to go beyond their duty under state law in order to comply with this federal law. Notwithstanding the position of the EPA, for doing so they will get no relief under section 169.

This distinction between the requirements of federal and state law leads to anomalies which would not arise under a more rational statute. Suppose a taxpayer buys a device for the control of pollution for $1 million in order to obey federal law, but could have satisfied state law with a machine costing only $250,000. The taxpayer can hardly be said to have spent its $1 million at the command of state law, when nothing is clearer than that the taxpayer would not have acquired its

49. *Contra*, Northern States Power Company v. Minnesota, 447 F.2d 1143 (8th Cir. 1971) (decided after the enactment of section 169) *aff'd mem.*, 92 S.Ct. 1307 (1972).

50. 33 U.S.C. §§ 407, 408-409, 411-415, 418 (1970).

51. Exec. Order No. 11574, 3 C.F.R. at 188 (1970), 33 U.S.C. § 407 (1970); *see* Schoenbaum, *The Efficacy of Federal and State Control of Water Pollution in Intrastate Streams: An Analysis*, 14 ARIZ. L. REV. 1, 24 & n.161 (1972).

The Corps of Engineers has declared a moratorium on the issuance of permits under the Refuse Act, 40 U.S.L.W. 1098 (January 4, 1971), following the district court decision in Kalur v. Resor, 335 F. Supp. 1 (D.D.C. 1971). The court held that the Refuse Act gave the Corps of Engineers no authority to permit the deposit of wastes in non-navigable waters, and enjoined the Corps from issuing permits for such deposits. The court further held that section 102(2)(c) of the National Environmental Policy Act, 42 U.S.C. § 4332(2)(C) (1970), which requires the preparation of detailed "impact statements" in connection with Federal action "significantly affecting the quality of the human environment," was applicable to the Corps' permit program, and enjoined the Corps from issuing any permits for navigable waters until it amended its regulations to provide for the required impact statements. The Senate has recently passed a bill, S. 2770, 92d Congress, 1st Sess. (1971), substantially amending the Federal Water Pollution Control Act which, among other things, establishes a national permit program administered by the EPA, deemed to satisfy the National Environmental Policy Act and applicable to both navigable waters and their tributaries.

Other federal laws which directly forbid pollution and which have been enacted since 1969 are those forbidding the discharge of oil into the navigable waters of the United States or its shorelines, 33 U.S.C. § 1161 (1970), and the discharge of untreated sewage by ships into the navigable waters of the United States, 33 U.S.C. § 1163 (1970). *See also* 42 U.S.C. §§ 1857c-6, 1857c-7, 1857c-8 (1970).

52. 33 C.F.R. § 209.131(d)(5), 36 Fed. Reg. 6564, 6566 (1971).

device had it had to act merely in "conformity with the State program or requirements." Suppose, however, that the taxpayer now argues that even state law would have required an anti-pollution investment of $250,000 and that he should, therefore, be allowed to amortize that amount under section 169. The answer to this assertion seems to turn on the nature of the devices employed. Sometimes devices to control water pollution are installed in series, in which the first facility purifies the effluent to a degree, and then discharges the effluent into a second facility which carries purification still further. If the first facility is required by state law, and both are required by federal law, the first would seem to qualify under section 169. To be contrasted with this is the case where the taxpayer installs only one facility that satisifies federal law and more than complies with state law. Here the taxpayer will be unable to point to any new identifiable treatment facility installed at the command of state law. The taxpayer could argue that if state law requires one-quarter the expenditure required by federal law, an undivided quarter of the taxpayer's device has been installed at the command of state law, but it is difficult to see how an undivided segment can meet the requirement of being an "identifiable" facility. Suppose that state law had required a settling tank with a capacity of 20,000 gallons, and federal law had increased the required capacity to 30,000 gallons. The same question would then arise: Could the taxpayer be allowed to point to two-thirds of its tank as an identifiable facility required by state as well as federal law?

Assuming that section 169 treatment is available only if the state certifying authority can certify that the pollution control device to be amortized was installed at the command of state pollution law, a further question arises as to the state pollution law to which section 169 refers. Most states have at least two pollution control laws: one created by statute and typically administered by pollution control agencies (the certifying authorities under section 169), and one made and enforced by judges, the law of nuisance. It seems unlikely that the condition of certification by the state pollution agency was meant to exclude from section 169 treatment the taxpayer who abates pollution in obedience to the law of nuisance. The law of nuisance may not be a state "program," but it is certainly a state "requirement," and state certification should be available.

What if the taxpayer is obeying the law of nuisance, but failing to meet the state certifying authority's standards? This may not be an unusual case since one purpose of the new laws being enforced by the state authorities is to go beyond the law of nuisance in controlling pol-

lution. This is only a special case of the problem of the taxpayer who installs a device which only approaches compliance with the state certifying authority's law. Whether such taxpayers have acted "in conformity" with state law is arguable, but moot because section 169 requires an additional certification by the EPA,[53] whose regulations apparently forbid federal certification of a taxpayer who is violating state law.[54]

A BETTER TAX SUBSIDY VERSUS DIRECT GRANTS

The foregoing analysis indicates that section 169 is in many ways an irrational and arbitrary way to subsidize firms that abate pollution. It has been argued elsewhere that the defects of section 169 show that it is necessarily a mistake to use the tax system to subsidize the prevention of pollution.[55] This is an overreaction to the flaws of section 169. It is possible to propose an income tax subsidy for the control of pollution that meets most of the objections to section 169.

Certain of those objections could be met without changing the basic scheme of the statute. Simple amendments could extend rapid amortization to anti-pollution devices installed in obedience to federal law, to patents, to structures built to disperse pollutants, and to devices installed in plants built since 1968. The latter change would raise the difficult problem of how to treat firms that installed new machinery as part of a change in manufacturing process which both increased production (or decreased production costs) and lessened pollution. The problem is how to separate the costs of the two effects, since only the cost of pollution control should qualify for tax relief. It has been argued that this indicates that tax relief to encourage the control of pollution is bound to be faulty,[56] but this difficulty will be found with any system of subsidizing the control of pollution. The argument goes to the wisdom of such subsidies, not to whether the subsidy should be in the form of tax relief.

Most of the other objections to section 169 in its present state could be met by changing the statute so that instead of providing for rapid amortization of tangible personal property, it granted a credit

53. I.R.C. § 169(d)(1)(B).
54. 18 C.F.R. § 602.8, 36 Fed. Reg. 9509-11 (1971). The EPA presumably finds statutory authority for this requirement in the provision that the taxpayer's investment be "in furtherance of the general policy of the United States for cooperation with the States in the prevention . . . of water pollution . . . or in the prevention . . . of atmospheric pollution." *See* I.R.C. § 169(d)(1)(B)(ii). The EPA also conditions its certification on obedience to federal anti-pollution regulations. *Id.* § 169(d)(1)(B)(i).
55. Roberts, *supra* note 2, at 1533; Wilson, *supra* note 27, at 8.
56. Wilson, *supra* note 27, at 6.

against income tax for a stated percentage of the amount spent on capital or operating costs to abate pollution. Amortization is inappropriate for assets that are non-depreciable, and it is hard to conceive of fitting labor or fuel costs into an amortization scheme, but there is no intrinsic objection to a credit for part of the cost of land, buildings, fuel or labor. In the case of fuel and labor, the credit would be measured by the extra costs of preventing pollution, and not, obviously, by the taxpayer's entire bill for fuel and labor. Unlike section 169, such a credit would not be an incentive to use present machinery to control pollution even where other methods were more efficient,[57] and it would not discriminate between industries according to the useful life of assets in each.

Another objection that has been raised to the use of tax subsidies for the control of pollution is that they cannot be "targeted to meet priority areas."[58] That is, certain areas of the country, like New York City, and certain industries, like electric power production, need subsidization more than others, and tax relief cannot be tailored to favor these needs. If discrimination is needed, there is nothing to stop Congress from granting different subsidies to taxpayers in different states, and in different industries. The deduction for disaster losses[59] is an example of the former, and the percentage depletion allowance[60] of the latter.

The value of a section 169 deduction, like that of any deduction, depends on the taxpayer's tax bracket, so that the higher the taxable income, the greater the subsidy, a regressive effect. For example, a $100 deduction reduces taxes by $70 for a taxpayer in the 70 percent bracket, but by only $20 for a taxpayer in the 20 percent bracket. This is perhaps unimportant for a deduction that will be taken mainly by corporations, since all corporations with taxable income over $25,000 pay at the same rate.[61] It would, in any event, be cured by the proposal to give a credit against tax instead of a deduction from gross in-

57. It is arguable that where a credit is available for both the purchase of assets and the incurring of operating costs, the credit for the purchase of assets should be spread over the life of the asset. Thus, a credit of $10,000 for the purchase of an asset with a useful life of 10 years would be granted at the rate of $1,000 per year. The purpsose is to keep the credit economically neutral between the purchase of assets and the incurring of operating costs which achieve the same purpose. For example, if the credit were 10 percent of cost, and the taxpayer had the choice of preventing pollution by buying a machine for $1 million which had a useful life of 10 years, or incurring $100,000 per year in extra fuel costs, it would create an artificial bias in favor of the first course if the credit were $100,000 in the first year for the machine, but $10,000 per year for 10 years for the fuel.

58. Wilson, *supra* note 27, at 7.

59. I.R.C. § 165(h).

60. *Id.* §§ 611, 613.

61. *Id.* § 11.

come. Even a credit against tax, however, would be of no use to the polluter who pays no income tax.

There are two classes of polluters that pay no income tax. The first, of course, is those with no taxable income. No study has been found that discloses what proportion of air and water pollution is produced by firms which have losses or are just breaking even, but the class is an important one for two reasons. First, firms without profits may be unable to raise funds to use in controlling pollution without a subsidy. Second, the relief of hardship is one of the purposes of section 169[62]—perhaps the main purpose—and the cost of controlling pollution is likely to be a hardship for a firm that has losses.

The second class of polluter that pays no income tax is that of tax-exempt entities, of which the most important for this purpose are governmental agencies. One thinks of muncipalities and local authorities that operate bus lines and apartment houses. If a purpose of subsidizing the control of pollution is to provide an incentive for polluters to comply with the law, these entities need the incentive as much as private firms. They are usually anxious to avoid deficits, and their decisions to incur the expenses of, for example, preventing the emissions of fumes from buses or soot from incinerators are for this reason open to the influence of a subsidy. Furthermore, the statutory purpose of relieving hardship applies to these public entities even though the hardship is on taxpayers who must finance deficits and customers who must pay higher prices because of the cost of abating pollution, rather than on stockholders.[63]

These important objections to the use of the tax system for the granting of subsidies can be met, but only by providing that if a firm's credit for pollution control costs exceeds its income tax, the government will pay it the difference. In other words, a tax subsidy in this area will be defensible only if it provides for a negative income tax. Given this, there is nothing in the nature of the control of pollution that makes other forms of subsidy preferable to tax relief.

Although there is nothing in the nature of pollution that makes it impossible to use the tax system as an incentive for its abatement, general objections to using the tax system to grant subsidies have been advanced by Professor Surrey.[64] They center on the way tax incentives

62. *See* text following note 42 *supra.*

63. Current law already provides for such a subsidy for municipal waste treatment plants. 33 U.S.C. § 1158 (1970).

64. Surrey, *Tax Incentives as a Device for Implementing Government Policy: A Comparison with Direct Government Expenditures,* 83 HARV. L. REV. 705, 727-32 (1970).

are enacted and administered, and have to do with the coordination of tax incentives in any given area with direct expenditures in the same area.

The first problem is that tax incentives are formulated in the tax committees of Congress. These committees cannot have expertise in all the substantive areas for which they are providing tax subsidies, and expertise is a major purpose of the committee system. Furthermore, direct expenditures are simultaneously being formulated for the same substantive areas of policy by other committees—in the case of pollution, these would include the House and Senate Public Works Committees and the House Interstate and Foreign Commerce Committee. Presently, there is no coordination between what the tax and the other committees are doing.

Similar problems arise in the formulation of budgets in the executive branch. When the EPA proposes a budget for the prevention of pollution each year, it is supposed to decide which kinds of expenditures are to be given priority over others. The EPA, however, has little to say about tax subsidies. That is the Treasury's job, but the Treasury has no way to compare the cost-effectiveness of section 169 with that of direct expenditures which could take its place. These problems continue after a tax subsidy is enacted: no agency or committee reviews the tax subsidy regularly, in a way analogous to the formulation of an agency's annual budget, to see if its cost is worthwhile in light of government policy in its substantive area for the coming year. "[T]ax incentives are not covered by the annual budgetary review process; the Bureau of the Budget doesn't even know about many of them, or how much they cost."[65]

These criticisms of the tax subsidy device, however, go to the way it is presently administered. As Professor Surrey admits,[66] there is nothing in principle to stop the tax committees of Congress from consulting with committees with expertise in other areas, or to prevent the Treasury from conferring with other departments of the executive. Each year's budget for a given agency could include a statement of the cost of the tax subsidies falling within its area of responsibility. Tax subsidies could be given expiration dates so that they would have to be reviewed periodically.[67] This does not, of course, mean that tax subsidies are rationally enacted and administered today, only that they could be, given some rather large and perhaps not-to-be-expected

65. *Id.* at 730.
66. *Id.* at 729, 731.
67. Section 169 will, in fact, expire at the end of 1974. I.R.C. § 169(d)(4)(B).

changes in our governmental system. Thus, the question becomes whether there is any *advantage* in using tax subsidies, instead of direct grants, which would compensate for the difficulty of having to make these changes.

The usual argument in favor of tax subsidies is that they are automatic, rather than dependent on the discretion of a granting agency. This theory can be summed up in the words "no red tape." This is a false dichotomy. Any lawyer who has had to decide whether a given structure qualifies for the investment credit,[68] or what political activities a tax-exempt organization under section 501(c)(3) can safely undertake,[69] knows that tax relief can be complex and that the conditions of its availability may turn on the attitude of the Internal Revenue Service. On the other hand, anyone who has received social security payments upon turning 65 can testify that not all direct grants are discretionary with a bureaucracy or tied up in red tape. As Professor Surrey has said, the advantages of automaticity and simplicity flow not from the use of tax subsidies, but from forbearing to impose complicated conditions upon the availability of a subsidy, whether the subsidy is in the form of tax relief or a direct grant.[70]

Section 169 itself is not a paradigm of simplicity.[71] Its availability depends on the approval not only of the Internal Revenue Service, but of the state certifying authorities and the EPA, and its terms are ambiguous on at least one vital point.[72] In order to be equitable, it would have to be amended to provide for a system of direct grants to entities that abated pollution but paid no tax.[73] There is no reason to think that it would be more complex or involve a greater degree of bureaucratic discretion if it were structured wholly as a system of direct grants. It is true that direct grants might be made discretionary with the EPA (for example, the grants might be made available on the basis of need), while section 169 as a tax statute is available to all who fall within its terms. If discretion in the making of grants is thought to be a bad thing in this case, however, there is nothing to stop Congress from making the direct grant automatic upon the showing of specified facts.

CONCLUSION

There is nothing about the nature of pollution which makes either tax subsidies or direct grants preferable for its control. A rational tax

68. *See Id.* § 48(a)(1)(B); Treas. Reg. § 1.48-1(e) (1964); Rev. Rul. 66-89, 1966-1 CUM. BULL. 7.
69. *See* Treas. Reg. § 1.501(c)(3)-1(c)(3) (1959).
70. Surrey, *supra* note 65, at 717.
71. McDaniel & Kaplinsky, *supra* note 1, at 370 n.83.
72. *See* text accompanying notes 40-54 *supra.*
73. *See* text accompanying notes 61-63 *supra.*

subsidy for the control of pollution could be constructed. Direct grants, however, would be considered by organs of Congress more qualified to deal with pollution than the tax committees, and would be more rationally and regularly reviewed as part of the executive's budget-making role than are tax subsidies. Tax subsidies could be so considered and reviewed, but to change the present structures of Congress and the executive for that purpose would be an enormous undertaking. It would probably be simpler and easier instead to use direct grants for pollution control subsidies.